Reverse — Davis —

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~238~~ 54

GEORGE M. BARNARD, PLAINTIFF IN ERROR,

vs.

E. N. KELLOGG, A. DUNHAM, A. C. DUNHAM, DRAYTON HILLYER, AND J. B. BUNCE.

IN ERROR TO THE CIRCUIT COURT OT THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED JUNE 10, 1869.

SUPREME COURT OF THE UNITED STATES.

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vs.

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1 To the sheriff of the county of Fairfield, his deputy, or either of the constables of the town of Norwalk, within said county, greeting:

By authority of the State of Connecticut you are hereby commanded to attach, to the value of thirty thousand dollars, the goods or estate of George M. Barnard, of the city of Boston, in the Commonwealth of Massachusetts, and him summon to appear before the superior court to be holden at Hartford, within and for the county of Hartford, on the second Tuesday of March, A. D. 1867, then and there to answer unto Ebenezer N. Kellogg, Austin Dunham, and Austin C. Dunham, all of said Hartford, partners in business therein, by the name of E. N. Kellogg & Co., and Drayton Hillyer and Jonathan B. Bunce, both of said Hartford, partners in business therein, by the name of Hillyer & Bunce, in a plea of the case.

Whereupon the plaintiffs declare and say that the defendant, [that] on the 6th day of August, A. D. 1864, in consideration that the plaintiffs, at the special instance and request of the defendant, would buy of him, the defendant, divers goods and merchandize, to wit, 144 bales of mestiza wool, for certain prices agreed upon by

2 and between the plaintiffs and defendant, amounting to the sum of $67,918 00, he, the defendant, undertook and faithfully promised the plaintiffs to furnish such bales of wool in all respects like to and of the same quality as the samples of wool then and there shown to and exhibited to the plaintiffs by the defendant, and that said 144 bales of wool should be throughout said bales of the same quality with said samples then and there exhibited and delivered to the plaintiffs by the defendant; which said samples were good and merchantable and sound wool, and of a good quality of mestiza wool.

And the plaintiffs say that though they, confiding in the said promise and undertaking of the defendant, did afterwards, on the 6th day of August, A. D. 1864, buy of him, the defendant, 144 bales of mestiza wool, at and for the price or sum aforesaid, as and for wool of the same quality with said samples, and of the same quality throughout said bales with the quality of wool contained in said samples; and as and for the same wool so agreed to be bought as aforesaid, and which the defendant then and there supplied and furnished to him, as and for such wool, and the plaintiffs then and there

3 paid the defendant the said sum of $67,918 00 as and for such wool as aforesaid; yet the defendant, not regarding his promise and undertaking, did not, though often requested so to do, furnish and deliver such wool as aforesaid, of the same quality throughout said bales with said samples, and of the same quality with said samples, according to his promise and undertaking so made as aforesaid, but wholly neglected so to do, and furnished and delivered to the plaintiffs 144 bales of wool rotten in its texture, of an inferior quality to said samples, not merchantable wool, not throughout said bales of a quality equal to said samples, but bales packed with wool greatly inferior to said samples, and with wool wholly worthless; and that said wool was wholly unfit for use, and thereby the plaintiffs not only lost all the benefit, profit, and advantage which they otherwise might and would have derived from the purchase of the said wool, but were put to great expense and loss in the sale and disposal of said wool, and were compelled to pay and did pay great damages in consequence of the worthlessness of said wool, and sustained great loss and damage in not being able

4 to sell and dispose of the same, in the whole amounting to the

sum of thirty thousand dollars, to recover which, with costs, this suit is brought.

And the plaintiffs further say that on the 6th day of August, A. D. 1864, in consideration that the plaintiffs, at the special instance and request of the defendant, had undertaken and faithfully promised the defendant to buy of him divers goods and merchandize, to wit, 144 other bales of mestiza wool, for certain prices agreed upon by and between the plaintiffs and defendant, amounting to the sum of $67,918 00, he, the defendant, undertook and faithfully promised the plaintiffs that said wool should be good and merchantable wool, and should be throughout said bales good and merchantable wool, and should be packed, bound, and tied up fairly, and should be the same grade of wool throughout said bales, and that the inside of said bales should be of the same quality with the outside thereof; and the plaintiffs say that though they, confiding in the said promise and undertaking of the defendant, did afterwards, on the said 6th day of August, A. D. 1864, buy of him,
5 the defendant, 144 bales of mestiza wool, at and for the price or sum aforesaid, as and for the same wool so agreed to be bought as aforesaid, and which the defendant then and there furnished to them as and for such wool, and paid therefor the said sum of $67,918, yet the defendant, not regarding his said promise and undertaking, did not, though requested, perform his said promise, and did not furnish and deliver to the said plaintiffs wool as aforesaid, according to his said promise and undertaking, but defrauded the plaintiffs in this, that said wool so furnished by the defendant was not good and merchantable wool throughout said bales, was falsely packed, bound and tied up unfairly, was not the same grade of wool throughout said bales, and the inside wool in said bales was not of the same quality with the outside thereof, but the wool within the outer covering of said bales was rotten, unsound, poor, and unmerchantable, inferior, composed of refuse wool and tags, was deceitfully packed, and was of no use to the plaintiffs; and that the plaintiffs were put to great expenses, and compelled to pay heavy damages in consequence of the inferior quality of said wool, and sustained great losses and damage in not being able to dispose
6 of said wool as they might have disposed of the same had the defendant complied with his said promise, and lost the benefit and profit which they might otherwise have derived from the purchase of said wool.

And the plaintiffs further say that on the 6th day of August, A. D. 1864, in consideration that the said plaintiffs, at the special instance and request of the defendant, would buy 71 other bales of mestiza wool, each of said bales being marked N, and 73 other bales of mestiza wool, each of said bales being marked [S. T.,] as and for the price of fifty cents per pound, being in all the sum of $67,918 00 to be therefore paid by the plaintiffs; he, the defendant, undertook and faithfully promised the plaintiffs that the wool in the 71 bales marked N then was in all respects of like and equal quality and goodness with, and was throughout said bales of equal quality with, a certain lot of wool then there shown and exhibited by the defendant to the plaintiffs as a sample of the wool contained in the said bales marked N; and that the wool in the respective bales marked [S. T.] then was in all respects of like and equal
7 goodness and quality with, and was throughout said bales respectively of equal quality with, certain respective lots of wool then & there shown and exhibited to the plaintiffs as respective samples of the wool contained in each of the respective bales marked [S. T.,] all

which samples were then & there exhibited & shown to the plaintiffs by the defendant, and which samples were of good and sound wool, and of good quality.

And the plaintiffs say that they, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, buy the said 71 bales of mestiza wool marked N, and the said 73 bales of mestiza wool marked [S.T.,] at & for the said price of fifty cents per pound, and then & there paid him the said sum of $67,918; yet the defendant did not perform or regard his promise & undertaking so made by him as aforesaid, but the wool contained in the said 73 bales of wool marked [S.T.,] respectively, was not, at the making of said promise & undertaking, of like and equal goodness & quality with, and was not throughout said respective bales of equal quality with, the said respective lots of wool shown and exhibited as aforesaid as samples of
8 the wool contained in said respective bales, but the said wool in each of said 73 bales respectively was of a greatly inferior quality to said respective samples, was rotten & unsound wool, and of worthless quality; that said bales, and the fleces of wool in the bales, were filled with refuse & worthless wool, of a quality greatly inferior to the respective samples, whereby the said 73 bales became & were of no use or value to the plaintiffs, and that the plaintiffs were put to great expense & damage in and about the sale & disposal of the said wool, and sustained great loss and damage, and were compelled to pay, and did pay, large damage in consequence of the worthlessness of said wool, to the great damage of the plaintiffs.

And the plaintiffs further say that on the day and year last aforesaid the said defendant sold to the plaintiffs 71 other bales of mestiza wool marked N, and 73 other bales of mestiza wool marked [S.T.,] at & for the price of $67,918, then & there agreed upon between the p'iffs and defendant, which sum of money the p'iffs paid to the def't, and, in consideration of such purchase, at & on such sale, he, the said defendant, undertook and faithfully promised the said plaintiffs that
9 the wool in the said 71 bales marked N then was in all respects of like and equal quality and goodness with, and was throughout said bales of equal quality with, a certain lot of wool then & there shown to the p'iffs by the def't as a sample of the wool contained in the said bales marked N, and that the wool in the respective bales marked [S. T.] then was in all respects of like and equal goodness & quality with, and was throughout said bales respectively of equal quality with, certain respective lots of wool then & there exhibited and shown by the def't to the pl'ffs as respective samples of the wool contained in each of the respective bales marked S. T., and which samples were of good & sound wool and good quality, yet the def't did not perform or regard his promise & undertaking so made by him as aforesaid, but the wool contained in the said 73 bales of wool marked [S.T.,] respectively, was not, at the time of said sale and of the making of said promise and undertaking, of like and equal goodness and quality with, and was not throughout said bales respectively of equal quality with, the said respective samples of wool contained in said respective bales, but the said
10 wool in each of said 73 bales respectively was of greatly inferior quality to said respective samples, was rotten & unsound wool, of worthless quality; that the fleeces of wool were filled with refuse & worthless wool of a quality greatly inferior to said respective samples, whereby the said 73 bales became & were of no value to the pl'ffs, and

that the pl'ffs were put to great expense & damage in and about the sale & disposal of the same, and sustained and were obliged to pay, and did pay, heavy damages in consequence of the worthlessness of said wool, and lost all the benefit & advantage which they otherwise would have derived from the purchase of said 73 bales, to the great damage of the pl'ffs.

And the plaintiffs further say that, on the 6th day of August, A. D. 1864, in consideration that the plaintiffs would, at the special instance and request of the defendant, buy of the defendant 71 other bales of mestiza wool, each of said bales being marked N, and 73 other bales of mestiza wool, each of said last-mentioned bales being marked [S.T.,] at

11 & for the price or sum, in all, of $67,918, to be therefor paid by the plaintiffs, he, the def't, undertook and promised the plaintiffs to deliver to them the said 144 bales of mestiza wool, and that said bales of wool marked N should all be of like goodness and quality with a certain lot of wool then & there exhibited & shown to the pl'ffs as a sample of wool contained in the said bales marked N, and that the said bales of wool marked [S. T.] should respectively be of like goodness & quality with certain respective lots of wool then & there exhibited & shown by the def't to the plaintiffs as respective samples of the wool contained in the last-mentioned bales respectively, and which said samples were then & there produced & shown to the plaintiffs.

And the plaintiffs say that they, confiding in the said promise & undertaking of the said defendant, did afterwards, to wit, on the day & year last aforesaid, buy the said 144 bales of wool at & for the price aforesaid, and then & there paid the said sum of $67,918 to the def't, and that the def't afterwards delivered to the plaintiffs 71 bales of wool marked N, and 73 bales of wool marked [S.T.,] as & for wool respectively of like goodness

12 & quality with the respective samples so as aforesaid produced & shown to the pl'ffs; yet that the defendant did not regard his said promise and undertaking, but deceived the pl'ffs in this, that the wool contained in the respective 73 bales marked [S. T.] so delivered to the pl'ffs, at the time of the delivery thereof to them, was not wool of like goodness & quality with the respective lots of wool shown to the pl'ffs as samples of the wool contained in the said bales marked S. T., respectively, but was much inferior in texture, was rotten & refuse wool, was not, throughout said bales respectively, of the same quality & goodness with said respective samples, and was damaged and unsaleable wool, whereas said samples were of good texture and quality, was sound, undamaged, not refuse, & saleable wool, and thereby the plaintiffs lost the benefit, profit, and advantage which they otherwise might and would have derived from the purchase of said wool, but were put to great loss and expense in the sale and disposal of said wool, and were compelled to pay, and did pay, large damage in consequence of the worthlessness of said wool, to the great damage of the pl'ffs.

And the plaintiffs say further that on the 6th day of August,

13 A. D. 1864, in consideration that the plaintiffs, at the special instance & request of the defendant, had undertaken and faithfully promised the defendant to buy of him 71 other bales of mestiza wool, each of said bales being marked N, and 73 other bales of mestiza wool, said 73 bales being contained in 79 packages, each of said package being marked [S.T.,] at a certain price per pound, to wit, 50 cents per pound, said wool amounting in all to 135,836 pounds, for the sum in all of $67,918 00, to be therefore paid by the def't, which said bales were

then in the storehouse of the said def't; he, the def't, undertook, and faithfully promised the plaintiffs to deliver to them the said 144 bales of mestiza wool, and that the wool in said 71 bales marked N should all be of like goodness & quality with a certain lot of wool then & there shown and exhibited by the def't to the plaintiffs as a sample of the wool contained in the said bales; and that the wool in 64 of the packages marked S. T., composing the said 73 bales, should all be of like goodness & quality with a certain lot of wool then & there shown and exhibited to the pl'ffs as a sample of the wool contained in the said 64 packages, and that the wool in the remaining 15 of
14 the packages marked S. T., composing the said 73 bales, should all be of like goodness & quality with a certain lot of wool then & there shown and exhibited to the def't by the pl'ff as a sample of the wool contained in the said 15 packages.

And the plaintiffs say that they, confiding in the said promise & undertaking of the said defendant, did afterwards, on said 6th day of August, A. D. 1864, buy the said 144 bales of wool at & for the price aforesaid, and then & there paid the said sum of $67,918 to the def't, and that the def't afterwards delivered to the pl'ffs the said 144 bales of wool, to wit, 71 bales, each marked N, and 73 bales, divided into 79 packages, each marked S. T., as & for bales of wool respectively, of like goodness & quality with the respective samples so as aforesaid produced & shown to the pl'ffs. Yet, that the def't did not regard his said promise & undertaking, but neglected to do so in this, that the wool contained in each of the 64 packages of wool marked S. T., so delivered to him, was not of like goodness and quality with the respective lot of wool alleged to be a sample of the wool contained in said 64 packages, and that the wool contained in each of the remaining 15 packages
15 into which the said 73 bales was divided at the time of the delivery thereof to them was not wool of like goodness & quality with the lot of wool alleged and shown as a sample of the wool contained in said 15 packages, which said respective samples were good wool and of good texture, but the wool in the respective packages marked S. T. was much inferior to said respective samples, was rotten, damaged, poorer in texture, and the inside of said package, & of the fleeces of wool in said packages, was filled with refuse, bad, & unsaleable wool, and with wool wholly worthless, whereby the pl'ffs were put to great expense, trouble, and damage. That the pl'ffs sold said 73 bales marked S. T. to Messrs. Lounsbury, Bissell & Co., of Norwalk, Connecticut, woolen manufacturers, and directed the same to be shipped, and the same were shipped, directly to said firm, from Boston, the place of the purchase from the def't by the pl'ffs, the said pl'ffs never having seen said wool in bulk, and having only seen said alleged samples, and sold said wool to said firm by said samples as & for the same wool which said samples represented and alleged it to be. That said wool being wholly unfit for use, and not answering to said samples,
16 the pl'ffs were compelled to pay, and did pay, large damage to said purchasers in consequence of said wools being inferior to said samples, and were put to great trouble, damage, and expense, & lost all the benefit which they otherwise would have derived from said purchase from the def't; all of which is to the great damage of the pl'ffs.

And the plaintiffs further say that on the 6th day of August, A. D. 1864, in consideration that the said plaintiffs, at the special instance and request of the def't, would buy 71 other bales of mestiza wool, each of said bales being marked N, and 73 other bales of mestiza wool, each

of said bales being marked [S.T.,] at and for the price of fifty cents per pound, being in all the sum of $67,918, to be therefor paid by the pl'ffs, he, the defendant undertook and faithfully promised the pl'ffs that the wool in the 71 bales marked N, and that the wool in the 73 bales marked [S.T.,] then was not falsely packed in said bales; that in the interior of said bales there was not placed any foreign substances, or wool greatly differing in character or condition from the wool
17 packed on the outside of said respective bales; that said wool was packed uniformly, and that inferior wool was not put into and concealed in the said respective bales within the outside layer of wool in said bales; that the wool packed on the outside of said respective bales and the outside layer of wool in said bales was of good quality and fit for use.

And the pl'ffs say that they, confiding in the said promise and undertaking of the said defendants, did afterwards, on the day and year aforesaid, buy the said 71 bales of mestiza wool marked N, and the said 73 bales of mestiza wool marked [S.T.,] at and for the said price of 50 cents per pound, & then & there paid said def't said sum of $67,918. Yet the defendant did not regard his promise and undertaking so made by him as aforesaid, but the wool contained in the said 73 bales of wool marked [S.T.,] respectively, was at the time of said promise and undertaking [was] falsely packed in said bales; that in the inside of said bales were packed foreign substances and wool greatly differing in character and condition from, and greatly inferior to, the wool on the outside of said bales; that the wool within the outside of said bales was rotten and
18 refuse wool, was composed of drag-locks and tags and sweepings, was not uniformly packed, but was deceitfully packed on the inside with refuse & inferior & rotten wool, & were unfit for use; and that worthless wool was placed within the outside layer of wool in said bales, so that the inferiority could not be detected from an external examination of said bales, whereby the said 73 bales became & were of no use or value to the pl'ffs, and that the pl'ffs were put to great expense and damage, and lost large sums in consequence of the worthlessness of said wool, to the great damage of the pl'ffs.

And the pl'ffs further declare and say that on the 6th day of August, 1864, in consideration that the pl'ffs, at the special instance and request of the def't, had undertaken & promised the def't to buy of him 71 other bales of mestiza wool, each of said bales marked N, and 73 other bales of mestiza wool, each of said bales marked [S.T.,] at & for 50 cents per pound, he, the def't, undertook and faithfully promised the pl'ffs that said respective bales of wool marked N, and said respective bales of wool marked [S.T.,] were not then falsely packed inside of said bales with wool greatly inferior in character or condition to the respective lots of wool then & there shown and exhibited to
19 the pl'ffs, as samples of the wool contained in said respective bales marked N and [S.T.,] and that the interior of said respective bales marked N and [S.T.,] were not packed with wool materially differing in character and condition, and inferior to said respective samples, and from the wool on the outside of said respective bales, and that wool inferior to said samples and to the outside layer of said respective bales was not concealed in the interior of said respective bales. And the plaintiffs say that they, confiding in the said promise and undertaking of the def't, did afterwards, on the 6th day of August,

1864, buy of him, the def't, said 71 bales marked N, and said 73 bales marked [S. T.] at & for the price or sum aforesaid, and then & there paid the said sum of 50 cents per pound for said bales, and that the def't afterwards, on said 6th day of August, 1864, delivered to the pl'ffs said respective bales of wool.

Yet that the def't did not regard his said promise and undertaking, but that said 73 bales of wool marked [S. T.] were at the time of the delivery thereof, & of said sale, falsely packed inside of said bales with wool greatly inferior in character and condition to the said lot
20 of wool purporting to be a sample of the wool in said bale marked [S.T.,] so shown and exhibited to the pl'ffs as aforesaid, and was packed inside of said bale with refuse & rotten wool, drag-locks, tags, sweepings, and wool unfit for use, and that in the interior of said bales there was placed at the time of the said sale and delivery, wool greatly inferior to said sample and to the wool on the outside layer of said bales, and that wool greatly inferior to said sample and to the outside layer of said bales marked [S. T.] was then concealed in the interior of said bales, to wit, refuse and rotten wool, drag-locks, tags, & wool unfit for use, whereby the pl'ffs were greatly damaged, and suffered great loss, and were compelled to pay large damages in consequence of the worthlessness of said wool, and the said 73 bales became & were of no use or value to the pl'ffs, all of which is to their great damage. All of which is to the great damage of the plaintiffs, the sum of thirty thousand dollars, to recover which, with just costs, this suit is brought.

And whereas the said defendant is an absent and absconding
21 debtor, within the true intent and meaning of [of] the law, not being liable to imprisonment at the suit of the plaintiff in this case, you are also hereby directed to leave a true and attested copy of this writ at least twelve days before the session of the court to which the same is returnable with Sarah A. Lounsbury, Edward C. Bissell, and Charles C. Betts, estate Clark Bissell; E. W. Stuart, Thomas B. Butler, S. P. S. Bissell, all of said town of Norwalk, partners in business by the name of Loundsbury, Bissell & Co., or at the usual place of abode of the said Loundsbury, Bissell, and Betts, Butler, Bissell, and Stuart, which said firm of Loundsbury, Bissell & Co. are the attorneys, agents, factors, trustees, and debtors of the said defendant, both individually and as a member of the firm of George M. Barnard & Co., to which firm said garnishees are also indebted.

(E. N. Kellogg is recognized in the sum of $100, to prosecute, &c.)

Hereof fail not, but of this writ, with your doings thereon, make due return according to law.

Dated at Hartford this 13th day of December, A. D. 1866.

N. SHIPMAN,
Justice of the Peace.

[U. S. rev. stamp of 50 cents.]

22 FAIRFIELD COUNTY, *ss:*

NORWALK, CONN., *Dec. 14th*, 1866.

Then, and by virtne hereof, I attached all the goods, effects, moneys, or credits due to, or belonging to, the within-named defendant, and in the hands and possession of the within-named garnishee, by leaving with Miss Sarah A. Loundsbury, E. W. Stuart, Thomas B. Butler, S. B. S. Bissell, Edward C. Bissell, and Charles C. Betts, and also a like true and attested copy with E. C. Bissell, administrator on the estate of

Clark Bissell, all of said Norwalk, a true and attested copy hereof at least twelve days before the session of the court to which this writ is returnable, they being the attorneys, agents, trustees, factors, and debtor of said defendant.

No service being made on defendant, he being a resident of another State.

Attest: WESTELL RUSSELL,
Deputy Sheriff.

Fees.

Travel, 140 miles	14 00
7 copies	8 75
7 services	87
Endorsement	25
	$23 87

23 To Hon. Elisha Carpenter, one of the judges of the supreme court of errors of the State of Connecticut:

The petition of George M. Barnard, of Boston, in the estate of Massachusetts, shows that he is defendant in a certain action demanding thirty thousand dollars debt, wherein E. N. Kellogg & Co. & al., of Hartford, in the State of Connecticut, are plaintiffs; in which action the following estate has been attached, to wit: A certain debt due to the defendant by certain persons doing business in Norwalk, in said State of Connecticut, under the name and firm of Loundsbury, Bissell & Co., which attachment was served by Westell Russell, of said Hartford, a deputy sheriff of the county of Fairfield; and the defendant is desirous that said attachment should be dissolved, upon the substitution of bond with surety, according to the statute.

Dated at Hartford, January 28th, 1867.

GEORGE M. BARNARD,
By his attorneys, T. C. & C. E. PERKINS.

24 To Messrs. E. N. Kellogg & Co. and others, and Messrs. Welch & Shipman, their attorneys, and to Westell Russell, all of Hartford, Conn.:

E. N. KELLOGG & Co. & AL. *vs.* GEORGE M. BARNARD. } Action of assumpsit, returnable to superior court for Hartford County, March term, 1867.

Take notice that the defendant will apply to Hon. Elisha Carpenter, a judge of the supreme court of errors of the State of Connecticut, at the court-house in said Hartford, on the 1st day of February, A. D. 1867, at 10 o'clock in the forenoon, to dissolve the attachment in this cause, upon the substitution of bond with surety, according to the statute.

Dated at Hartford this 28th day of January, 1867.

GEORGE M. BARNARD,
By his attorneys, T. C. & C. E. PERKINS.

Service of the above notice is hereby acknowledged.

WESTELL RUSSELL,
WELCH & SHIPMAN,
Attorneys for Plaintiffs.

25 Whereas the estate of George M. Barnard, of Boston, in the State of Massachusetts, has been attached by E. N. Kellogg & Co. & al., of Hartford, in the State of Connecticut, by writ dated December 13th, 1866, returnable to the March term of the superior court for Hartford County, in said State of Connecticut, as by the officer's return in said writ, which estate is estimated to be of the value of twelve thousand dollars:

You, George M. Barnard, of said Boston, as principal, and Albert Day, of said Hartford, as surety, acknowledge yourselves jointly and severally bound unto the said E. N. Kellogg & Co. & al., in the said sum of twelve thousand dollars, conditioned that if the said George M. Barnard shall pay the judgment that may be recovered against him in such suit, not exceeding the amount of this recognizance, then this recognizance shall be void.

Dated this 31st day of January, A. D. 1867.

GEORGE M. BARNARD. [L. S.]
ALBERT DAY. [L. S.]

Bond approved.—W. & S.

26 HARTFORD COUNTY, *ss:*

HARTFORD, *February 1st*, 1867.

Upon the hearing of the foregoing application, and the notice thereto annexed, I do hereby certify and find, that reasonable notice thereof in writing, signed by the attorneys of the defendant, has been served upon the attorneys of the plaintiffs, and upon the officer serving the attachment; that the parties appeared, and were duly heard as to the amount and sufficiency of the bond offered by the defendant; which bond I do find to be sufficient, and do accept the same in substitution of said attachment.

Whereupon I do hereby dissolve the attachment in said suit, and the same is dissolved accordingly.

ELISHA CARPENTER,
Associate Judge of the Supreme Court of Errors.

To the honorable superior court of the State of Connecticut, now in session at Hartford, in and for the county of Hartford, in said State, at the March term thereof, A. D. 1867:

27 The petition of George M. Barnard, of Boston, in the State of Massachusetts, a resident in, and citizen of, said State of Massachusetts, represents that he has been made defendant in a certain action at law brought to the present term of this court by E. N. Kellogg and others, all of whom are residents in, and citizens of, the said State of Connecticut, which suit is now pending; in which suit the matter in dispute exceeds the amount of five hundred dollars, exclusive of costs, as will more fully appear by the writ in said action now on file; and your petitioner represents that he desires to remove the said action, and all the allegations, pleadings, and proceedings arising therefrom, unto the honorable circuit court of the United States for the second circuit in the district of Connecticut, according to the laws of the United States in that behalf. Wherefore he prefers this petition to this honorable court, and prays for the removal of said cause for trial into the next circuit court to be holden in and for the district of Connecticut, to wit, into the circuit court of the United States for the second

circuit, at its term next to be holden in the town and county of
28 New Haven, on the 4th Tuesday of April, A. D. 1867, and the said defendant is prepared to offer, and hereby does offer, for the acceptance of this court, good and sufficient surety for his entering in said circuit court, on the first day of its session in said April term, copies of said process against him, and doing all other and further things for the performance of which the laws of the United States require a petitioner for the removal of a cause into the said circuit court from a State court to give good and sufficient security.

Dated at Hartford this 12th day of March, A. D. 1867.

GEORGE M. BARNARD,
By his attorneys, T. C. & C. E. PERKINS.

At a superior court holden at Hartford, within and for the county of Hartford, in the State of Connecticut, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and sixty-seven:

Present, Honorable Dwight W. Pardee, judge.

The above and foregoing petition is granted, and the cause described therein is removed into the United States circuit court next to
29 be holden at the city and county of New Haven, within and for the second circuit, at its April term A. D. 1867, and Charles E. Perkins, esq., recognizes in the sum of two hundred dollars, conditioned that the plaintiff shall enter copies of the process in this case in said United States circuit court for the second circuit, at its session next to be holden at New Haven, on the fourth Tuesday of April, A. D. 1867, on the first day of said session.

STATE OF CONNECTICUT,
County of Hartford, ss, Superior Court, Clerk's Office:

I, Chauncey Howard, clerk of the superior court for said county of Hartford, do hereby certify that the foregoing is a true copy of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Hartford, in said county, on this 12th day of April, A. D. 1867.

[SUP. C'T SEAL, H'F'D. CO.] CHAUNCEY HOWARD,
Clerk State of Connecticut.

[U. S. rev. stamp, 5 ct.]

COUNTY OF HARTFORD, *ss:*

I, Dwight W. Pardee, judge of the superior court, now presiding in and for said county, do hereby certify that Chauncey Howard, whose
30 name is subscribed to the above certificate, is clerk of the superior court of the county of Hartford; that the seal affixed to the above certificate is the genuine seal of said court; and that the foregoing attestation is in due form.

DWIGHT W. PARDEE,
Judge of Superior Court.

United States circuit court, district of Connecticut.—Action of assumpsit.

E. N. KELLOGG & AL.
vs.
GEO. M. BARRNAD. } Def't's plea and notice.

And now the said def't in court defends, pleads, and says that the

allegations contained in the pl'ffs' declaration are not true; and thereof puts himself upon the court for trial by agreement.

Def't by his atty's, T. C. & C. E. PERKINS.

And the pl'ff doeth the like.

Pl'ffs by there atty's, WELCH & SHIPMAN.

Notice.

The def't will take notice that under the above plea the def't will, if it becomes necessary upon the trial of said case, offer evidence
31 to prove that said wool described in the pl'ff' declaration, was purchased by the pl'ffs of the defendants in Boston, in the State of Massachusetts, and that by the usage and custom of dealers in wool in general, and especially in the State of Massachusetts and the city of Boston aforesaid, whenever it is claimed by the buyer of foreign wool, that the same is not according to sample, unfairly packed, rotten, unmerchantable, or in any other respect not according to contract, that the buyer should, as soon as practicable, and at any rate within thirty days from the time of sale, give notice thereof to the seller and to give the seller or his agents full opportunity to examine all the wool so claimed to be not in accordance with contract, in connection with the original covering or wrappers bearing the packers' and shippers' marks or numbers, so that the seller can identify the wool by said wrappers, numbers, and marks, and thereby can become satisfied, and have the necessary evidence of the identity of the bags alleged to be falsely packed, or containing the wool so not in accordance with the contract,
32 with those sold by him, and should in all ways give the seller an opportunity immediately to claim damages from the person from whom he purchased said wool, or who consigned the same to him, and to prove to such person that the said wool was in the condition claimed by said vendee.

And the def't will offer evidence to prove that the pl'ffs did not, so soon as was practicable, nor within thirty days of the time of sale, notify the def't thereof, or give the def't an opportunity to examine said wool, or the wrappers or covers thereof, or the marks thereon, and did not give any such notice to the def't for a very long time, to wit, for more than a year after said sale, and have never given the def't any opportunity to examine said wool, or its original wrappers or covers, or the marks thereon, but the pl'ffs, before any such notice was given to the def't, had used, or caused to be used, all said wool, and had destroyed, or caused or allowed to be destroyed, all said original wrappers or covers bearing said planters' and shippers' marks, so that the def't, if ever liable to the pl'ffs for any damages, were entirely deprived of all re-
33 course to the persons by whom such false packing, if any, was done.

That the def't was not the grower or packer of said wool, but was a merchant in the said city of Boston, where said wool was purchased of him by the def'ts, and that said wool was grown and packed in Buenos Ayres and other foreign countries, and imported into this country in the original bags & packages, and with the marks of those who grew & packed the same upon the outer coverings of the wool; that the same was not opened or repacked by the def't, and that this def't had no personal knowledge whatever of the actual condition of the said wool.

That said wool was sold to the pl'ffs upon actual examination made, or agreed to be made, by said pl'ffs and their agents, and that the def't

did not warrant the said wool to be of any especial quality, or uniform or equal to any sample.

34 United States circuit court, district of Connecticut.—April term, 1868.

E. N. KELLOGG & CO. }
vs.
GEORGE M. BARNARD. }

It is hereby stipulated and agreed that a trial by the jury in the above-entitled action is waived, and that said action may be tried by the court without any jury.

WELCH & SHIPMAN,
Att'ys for Pl'ffs.
T. C. & C. E. PERKINS,
Att'ys for Def'ts.

U. S. circuit court, district of Connecticut.—Sept. term, 1868.

E. N. KELLOGG ET ALS. }
vs.
GEORGE M. BARNARD. }

This is an action on the case to recover damages alleged to have been suffered by the plaintiffs by reason of loss sustained by them, on a lot of wool bought by them of the defendant. The case was originally brought in the superior court for the State of Connecticut, in the county of Hartford, where the plaintiffs reside, and was by the defendant
35 removed into this court.

In this court the parties, by stipulation, duly waived a jury, and the cause was duly tried to the court; and, after hearing the evidence and the arguments of counsel, the court finds the following facts:

First. That the plaintiffs were, at the time of bringing this suit, and ever since have been, citizens of, and residents in, the State of Connecticut, and the defendant was, at the time of bringing this suit, and ever since has been, a citizen of, and resident in, the State of Massachusetts.

Second. That the plaintiffs are merchants and dealers in wool at Hartford, in the State of Connecticut, and the defendant is a commission merchant, importer, and dealer in foreign wool, at Boston, in Massachusetts.

Third. That George Wm. Bond & Co. are wool-brokers at Boston aforesaid.

Fourth. That on the 13th of July, 1864, said Bond & Co. wrote E. N. Kellogg & Co. (several of the plaintiffs in this suit) the following letter:

"BOSTON, *July* 30, 1864.

"Me'rs. E. N. KELLOGG & CO.

"GENT.: We send you to-day, by request of your junior, the fol-
36 lowing samples of mestiza wool:

961	S. T.	64	bales	No. 1	50 c.
962	"	15	"	"	"
963	N	71	"	merino	55
964	V	24	"	No. 1	50

"With 963 there are two low bales at half price. These are the lowest prices we have been able to obtain, and they depend entirely upon gold valuation. We should be happy to hear from (you) on either or all lots.

"We remain, yours truly,

"GEO. WM. BOND & CO.,
"Per W. G. B."

That the above letter, with the samples of wool therein referred to, was received in due course of mail by said E. N. Kellogg & Co.; that subsequently the following correspondence, by telegraph and mail, passed between the said Bond & Co. and the said E. N. Kellogg & Co.:

"AUG. 2, 1864.

To E. N. KELLOGG & CO., *Hartford:*

"If fifty (50) cents all round is offered for mestiza, may sell.

(Signed) "GEO. WM. BOND & CO."

"AUGUST 6, 1864.

"To GEO. WM. BOND & CO, *Boston:*

"Party will take four (4) lots mestiza, if they compare with samples, at fifty (50) cents, fifteen (15) days.

(Signed) "E. N. KELLOGG & CO."

37 "AUG. 6, 1864.

"To E. N. KELLOGG & CO.:

"Have mestiza four (4) lots, but must be examined Monday.

(Signed) "GEO. WM. BOND & CO."

"BOSTON, *Aug.* 6, 1864.

"Mess. E. N. KELLOGG & CO., *Hartford.*

"GENTLEMEN: Your telegram rec'd, offering 50 cts., cash 15 days, for the 4 lots mestiza, equal to sample or no sale, and we have closed the wool for you and telegraphed you to be here Monday, without fail. This is one point in the sale, that it must be reported on by that time. You have got a bargain as the market now stands.

"Very truly, yours,

(Signed) "GEO. WM. BOND & CO."

Fifth. That the last-named letter was received by E. N. Kellogg & Co. on Saturday evening, Aug. 6, 1864, and on Sunday evening following the senior member of the firm, (E. N. Kellogg,) went to Boston, and on Monday morning, August 8th, proceeded to the store of said Bond & Co., where a sample bale of each and all said lots of wool had been previously sent by the defendant, that they might be examined by such customers as were seeking to purchase. Said sample bales were put up in the usual way of mestiza wool; had been packed at Bueones
38 Ayres, in South America, and brought to this country in iron-bound bales of about 1,000 lbs. each. The bales stood on end in the store of Bond & Co., with one or two of the end hoops broken, and the burlaps or bagging enclosing the same partially removed.

Said Kellogg proceeded to examine the same in the usual and customary way of purchasers of such wool, by taking up and inspecting the loose fleeces which had been rendered accessible by removing a portion of the hoops. Both the preparation of the bales for examination by Bond & Co., and the examination of the bales by Kellogg, were in the usual and customary mode observed in the sale of for-

eign wool of this character. After examining the loose fleeces that were accessible, Kellogg was informed by Bond & Co. that the bulk of the wool was in the U. S. bonded warehouse, and that he could go and examine it if he chose and would have the bales sufficiently opened by the brokers for that purpose, which he declined to do, and concluded the purchase, on joint account of all the plaintiffs. In this purchase were seventy-three (73) bales of mestiza wool, which it is alleged were subsequently found to have been falsely and deceitfully packed, and
39 it is to these seventy-three bales that the present controversy wholly relates. That the examination of the interior of the bulk of the bales of wool generally put up like these is not customary in the trade, and though possible, would be very inconvenient, attended with great labor and delay, and for these reasons is impracticable.

Sixth. That on the 17th of August, 1864, the wool purchased was weighed out, paid for, and delivered to Bond & Co., as the agents of the plaintiffs, for that purpose, who stored the same in Boston subject to the plaintiffs' order where it remained till March, 1865.

Seventh. That on the 19th of January, 1865, the plaintiffs sold the 73 bales in question to Loundsbury, Bissell & Co., of Norwalk, Connecticut, and the same was shipped at Boston to the latter firm in March, 1865, and in April following the latter proceeded to open some of the bales to use in their manufactory at Norwalk. They immediately notified the plaintiffs of the condition in which they found the wool in the few bales they had opened, and the plaintiffs proceeded to Norwalk and after having satisfied themselves of its condition, they, on the first of May, 1865, notified Bond & Co. that the same was "false packed and damaged," and "entirely different from the samples."

40 Eighth. That this notice to Bond & Co. was immediately communicated to the defendant, who replied by requesting that the marks and numbers of the bales found falsely packed might be sent to him, when he would examine into the matter and do what was proper and just. This request and promise was immediately communicated to the plaintiffs.

Ninth. That the only visible mark on any of these 73 bales, so far as the proof shows, was the mark [S. T.,] the initials of Samuel Tyler, who bought this wool at Bueonas Ayers, had it packed there, and consigned it to the defendant at Boston,) and this mark was on each bale, and the bales were all regularly numbered, and the numbers marked thereon.

Tenth. That the plaintiffs, within a reasonable time, caused to be delivered to the defendant the numbers and weight of twenty-four bales respectively, but not the marks; and the defendant then waived his request for, and his right to call for, the marks on these twenty-four bales; and that the defendant waived his request for, and his right to call for, the marks and numbers both, on eleven more bales, and
41 caused said eleven bales to be examined by his own agents, duly authorized for that purpose.

Eleventh. That as to the remaining thirty-seven of the seventy-three bales, no marks or numbers were ever furnished by the plaintiffs to the defendant, nor did he ever waive his right to call for the same.

Twelfth. That by the custom of merchants and dealers in foreign wool in bales in Boston and New York—the principal markets of this country where such wool is sold—there is an implied warranty of the seller to the purchaser that the same is not falsely or deceitfully packed; and whenever any such wool is sold, and is, within a reasonable time, found to be falsely and deceitfully packed, the seller, on notice from the purchaser, given in a reasonable time, of the fact of such false packing,

and of the marks and the marks and numbers on the bales, is bound, by the custom of such merchants aforesaid, to indemnify the purchaser, and make good to him any loss or damage he may have sustained in consequence of such false and deceitful packing.

Thirteenth. That the seventy-three bales of wool in question were, in fact, falsely and deceitfully packed, by placing in the interior of
42 said bales rotten and damaged wool, dirt, and dung, which material were foreign to, and did not properly belong to or with these fleeces; and that the said foreign matter was concealed by an outer covering of fleeces in their fair and ordinary state, thus forming a fair but deceitful exterior to the bales.

Fourteenth. That the loss and damage sustained by the plaintiffs in consequence of said false and deceitful packing of the twenty-four bales, the numbers and weight of which they furnished the defendant, and the right to call for the marks of which the defendant waived, is two thousand five hundred dollars; and the loss and damage sustained by the plaintiffs in consequence of said false and deceitful packing of the eleven bales, the right to call for the marks and numbers of which the defendant waived, is one thousand one hundred dollars—making thirty-five bales in all, the damage and loss on which amounts in the whole to three thousand six hundred (3,600) dollars.

Fifteenth. That the loss and damage sustained by the plaintiffs in consequence of said false and deceitful packing of the remaining
43 thirty-seven bales is four thousand one hundred dollars.

Sixteenth. That when the defendant sold the plaintiffs said seventy-three bales of wool, he had no knowledge or reason to believe that they, or any of them, were falsely or deceitfully packed, and he sold the same to the plaintiffs in good faith, supposing that they were fairly and honestly packed.

Seventeenth. That the defendant was not the absolute exclusive owner of said wool, but the same was consigned to him by Samuel Tyler, who bought the same in good faith in Buenos Ayers, and to whom the defendant had advanced the funds for the purchase of the same. The only interest the defendant had in the wool was in the nature of a lien on the same for his advance and commissions.

Eighteenth. That the plaintiffs bought the wool of the defendant directly through his brokers, and with no knowledge or reason to believe than any other person than the principal for whom the were acting had any interest therein. That the brokers did not the name of the defendant till the wool was weighed and bil were they requested to do.

44 Nineteenth. That Bond & Co. were employed by the ant in negotiating for the sale of this wool as well known engaged in effecting sales of such merchandise, but they had no authority to complete a sale without first reporting the condi terms with defendant, and the defendant instructed them that h not sell by sample at all, but would sell if the party would come ston, examine the wool, and accept it immediately, but this instruction was not known to the plaintiffs beyond what may [may] be infered from the fact that they were required to come to Boston and examine the wool as stated in the telegram and letter set forth in the fourth article of this finding.

Twentieth. That the examination by Kellogg at the time he purchased the wool did not reveal any false packing, nor did he or any of the other plaintiffs discover that the same was falsely packed until the fact was communicated to them by Loundsbury, Bissell & Co., in April, 1865.

eign wool of this character. After examining the loose fleeces that were accessible, Kellogg was informed by Bond & Co. that the bulk of the wool was in the U. S. bonded warehouse, and that he could go and examine it if he chose and would have the bales sufficiently opened by the brokers for that purpose, which he declined to do, and concluded the purchase, on joint account of all the plaintiffs. In this purchase were seventy-three (73) bales of mestiza wool, which it is alleged were subsequently found to have been falsely and deceitfully packed, and
39 it is to these seventy-three bales that the present controversy wholly relates. That the examination of the interior of the bulk of the bales of wool generally put up like these is not customary in the trade, and though possible, would be very inconvenient, attended with great labor and delay, and for these reasons is impracticable.

Sixth. That on the 17th of August, 1864, the wool purchased was weighed out, paid for, and delivered to Bond & Co., as the agents of the plaintiffs, for that purpose, who stored the same in Boston subject to the plaintiffs' order where it remained till March, 1865.

Seventh. That on the 19th of January, 1865, the plaintiffs sold the 73 bales in question to Loundsbury, Bissell & Co., of Norwalk, Connecticut, and the same was shipped at Boston to the latter firm in March, 1865, and in April following the latter proceeded to open some of the bales to use in their manufactory at Norwalk. They immediately notified the plaintiffs of the condition in which they found the wool in the few bales they had opened, and the plaintiffs proceeded to Norwalk and after having satisfied themselves of its condition, they, on the first of May, 1865, notified Bond & Co. that the same was "false packed and damaged," and "entirely different from the samples."

40 Eighth. That this notice to Bond & Co. was immediately communicated to the defendant, who replied by requesting that the marks and numbers of the bales found falsely packed might be sent to him, when he would examine into the matter and do what was proper and just. This request and promise was immediately communicated to the plaintiffs.

Ninth. That the only visible mark on any of these 73 bales, so far as the proof shows, was the mark [S. T.,] the initials of Samuel Tyler, who bought this wool at Bueonas Ayers, had it packed there, and consigned it to the defendant at Boston,) and this mark was on each bale, and the bales were all regularly numbered, and the numbers marked thereon.

Tenth. That the plaintiffs, within a reasonable time, caused to be delivered to the defendant the numbers and weight of twenty-four bales respectively, but not the marks; and the defendant then waived his request for, and his right to call for, the marks on these twenty-four bales; and that the defendant waived his request for, and his right to call for, the marks and numbers both, on eleven more bales, and
41 caused said eleven bales to be examined by his own agents, duly authorized for that purpose.

Eleventh. That as to the remaining thirty-seven of the seventy-three bales, no marks or numbers were ever furnished by the plaintiffs to the defendant, nor did he ever waive his right to call for the same.

Twelfth. That by the custom of merchants and dealers in foreign wool in bales in Boston and New York—the principal markets of this country where such wool is sold—there is an implied warranty of the seller to the purchaser that the same is not falsely or deceitfully packed; and whenever any such wool is sold, and is, within a reasonable time, found to be falsely and deceitfully packed, the seller, on notice from the purchaser, given in a reasonable time, of the fact of such false packing,

and of the marks and the marks and numbers on the bales, is bound, by the custom of such merchants aforesaid, to indemnify the purchaser, and make good to him any loss or damage he may have sustained in consequence of such false and deceitful packing.

Thirteenth. That the seventy-three bales of wool in question were, in fact, falsely and deceitfully packed, by placing in the interior of
42 said bales rotten and damaged wool, dirt, and dung, which material were foreign to, and did not properly belong to or with these fleeces; and that the said foreign matter was concealed by an outer covering of fleeces in their fair and ordinary state, thus forming a fair but deceitful exterior to the bales.

Fourteenth. That the loss and damage sustained by the plaintiffs in consequence of said false and deceitful packing of the twenty-four bales, the numbers and weight of which they furnished the defendant, and the right to call for the marks of which the defendant waived, is two thousand five hundred dollars; and the loss and damage sustained by the plaintiffs in consequence of said false and deceitful packing of the eleven bales, the right to call for the marks and numbers of which the defendant waived, is one thousand one hundred dollars—making thirty-five bales in all, the damage and loss on which amounts in the whole to three thousand six hundred (3,600) dollars.

Fifteenth. That the loss and damage sustained by the plaintiffs in consequence of said false and deceitful packing of the remaining
43 thirty-seven bales is four thousand one hundred dollars.

Sixteenth. That when the defendant sold the plaintiffs said seventy-three bales of wool, he had no knowledge or reason to believe that they, or any of them, were falsely or deceitfully packed, and he sold the same to the plaintiffs in good faith, supposing that they were fairly and honestly packed.

Seventeenth. That the defendant was not the absolute exclusive owner of said wool, but the same was consigned to him by Samuel Tyler, who bought the same in good faith in Buenos Ayers, and to whom the defendant had advanced the funds for the purchase of the same. The only interest the defendant had in the wool was in the nature of a lien on the same for his advance and commissions.

Eighteenth. That the plaintiffs bought the wool of the defendant directly through his brokers, and with no knowledge or reason to believe than any other person than the principal for whom the brokers were acting had any interest therein. That the brokers did not disclose the name of the defendant till the wool was weighed and billed, nor were they requested to do.

44 Nineteenth. That Bond & Co. were employed by the defendant in negotiating for the sale of this wool as well known brokers engaged in effecting sales of such merchandise, but they had no express authority to complete a sale without first reporting the conditions or terms with defendant, and the defendant instructed them that he would not sell by sample at all, but would sell if the party would come to Boston, examine the wool, and accept it immediately, but this instruction was not known to the plaintiffs beyond what may [may] be infered from the fact that they were required to come to Boston and examine the wool as stated in the telegram and letter set forth in the fourth article of this finding.

Twentieth. That the examination by Kellogg at the time he purchased the wool did not reveal any false packing, nor did he or any of the other plaintiffs discover that the same was falsely packed until the fact was communicated to them by Loundsbury, Bissell & Co., in April, 1865.

Conclusions of law.

First. This was not a sale by sample, though samples were
45 forwarded to the plaintiffs, and they replied by an offer of 50 cts. all round provided the bulk equalled the samples; yet the broker informed them that one point in the sale was that they were to be in Boston on Monday and examine the wool. The telegram and letter of the brokers of the 6th of August, taken together, show that it was not their intention to sell without an examination was first made by the buyer. They were both sent after the offer by sample, and apprised the plaintiffs that the sale must be upon the usual examination of the article. If the plaintiffs intended to rely on the samples, and purchase on that basis, their journey to Boston and their examination of the bales at the brokers' store were wholly superfluous. More than this, the examination of the bales at the brokers' store, after notice that such examination was necessary before the contract could be completed, was inconsistent with the idea of a sale by sample with a warranty that the bulk of the wool should equal the specimens sent to Hartford.

The exposure of the few bales at the brokers' store was in no sense a
46 representation of samples warranted to accurately represent the bulk. The object of the exhibition of these bales was doubtless correctly stated by Mr. Kellogg, one of the plaintiffs, who said in his testimony that it "was to inspire confidence." It was an appeal to their judgment and discretion of the purchaser. There was no express warranty that the bales not examined should accurately correspond to those exhibited at the brokers' store. The law under the circumstances can imply no such warranty.

Second. This was a sale where, as to the general character and quality of the goods, the maxim caveat emptor applies. "Where goods are in esse, and may be inspected by the buyer, and there is no fraud on part of the seller, the maxim caveat emptor applies even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer. The buyer in such a case has the opportunity of exercising his judgment upon the matter, and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case, it is not an implied term of
47 the contract of sale that the goods are of any particular quality or merchantable." (Law Reports, 2 B., 1868, p. 202.)

Third. This was a sale under a custom of the trade which implies a warranty against false packing. The validity of a custom somewhat similar to this was recognized by the supreme court of Massachusetts in the Cusco Manufacturing Company vs. Dixon, (3 Cush., 407.) The court in the present case has found that the custom exists, qualified by the condition that the seller must be notified and furnished with the marks and numbers of the bales claimed to be falsely packed. The main feature of the custom, to wit, that there is in the sale of wool packed in bales, as this was, a warranty of the seller against false packing, was proved by the concurrent testimony of many of the witnesses on both sides.

The point of difference among them was touching the time within which the buyer must give the seller notice of the fraud and make his claim. On this point there was great diversity of opinion among the defendants' witnesses. But the conclusion which the court arrived at on the whole evidence, and which is stated in the finding of
48 facts, is, that notice of the fraud, and of the marks and numbers

on the bales, must be given to the seller in a reasonable time. This, indeed, is the only practicable rule in connection with, or as a part of, the custom. What a reasonable time is, is a question of fact to be determined as each case arises.

Fourth. The court has found that notice of the fraud was in this case given to the seller in a reasonable time, and, that as to the marks and numbers, the latter on twenty-four bales were furnished the seller within a reasonable time, and the former were not insisted on but waived. As to eleven bales more, it is found that the defendant waived all claim to have the marks and numbers furnished him. He caused them to be examined himself by his agents. He must at that time have well known that the wool in question was part of the lot he bought of, or rather received on consignment from Samuel Tyler. This is doubtless the reason why he did not insist on the marks, when the numbers and weight of each of the twenty-four bales were presented to
49 him. All these seventy-three bales were marked S. T., and this was the only mark (except the numbers) which it is proved were on the bales. It was by this mark that they were billed to the plaintiffs.

Fifth. It follows that the plaintiffs have a right to recover thirty-six hundred dollars, being the loss sustained by them on thirty-five bales, the marks and numbers on which were furnished the seller, or by him waived. They are entitled also to recover interest at the rate of six per cent. on that amount from Jan'y 19, 1865, to the present time.

Sixth. As to the loss sustained on the remaining thirty-eight bales, amounting to forty-one hundred dollars, the plaintiffs are not entitled to recover. It was their duty to have furnished the marks and numbers on these bales, or been excused therefrom by the defendant. This part of the custom must be complied with in order to entitle the purchaser to make a valid claim. It may, and often must, be important for the seller to have these marks and numbers for the purpose of enabling him to identify the article as one sold by him, and of furnishing him
50 with the means of resorting to the person who sold or consigned the goods to him. It is easy for the [the] purchaser to furnish the marks and numbers, as they are on the outside of the bales. The plaintiffs having failed to comply with this feature of the custom upon which they alone can rely, so far as these thirty-eight bales are concerned, and the defendant never having waived his right to insist on such compliance, the plaintiffs must, to that extent, fail to recover.

Let judgment be entered for the plaintiffs to recover of the defendant the sum of four thousand four hundred and eleven $\frac{20}{100}$ dollars, and costs.

A stay of execution for ten days is granted, within which either party can file exceptions and take out a writ of error, or enter an appeal in the cause.

51 At a circuit court of the United States appointed by law to be held and held in Hartford within and for the district of Connecticut, second circuit, on the third Tuesday in September, A. D. 1869:

Present, Hon. William D. Shipman, district judge.

Be it remembered that the parties in the case of Ebenezer N. Kellog et al. against George M. Barnard, pending in this court, stipulated in writing to try the issue therein to the court without the intervention of a jury; and thereupon said parties appeared in court and were heard with their evidence and arguments of counsel, and the court, having

duly considered the same, finds the issue for the plaintiff; and thereupon it is considered by this court that the plaintiff recover of the defendants the sum of four thousand four hundred and eleven $\frac{20}{100}$ dollars damages, together with their costs taxed, and allowed to be dollars.

52

53 United States circuit court, district of Connecticut.

E. N. KELLOGG & AL.
vs.
GEORGE M. BARNARD. } Bill of exceptions of def't.

Be it remembered that in the above-entitled action, within the time limited by the court for that purpose, the defendant excepts to the conclusions of law contained and set out in the opinion of the court in said cause, and to the judgement founded thereon, and files this his bill of exceptions thereto, and for such exceptions he assigns the following, viz:

First. That by the third conclusion of law set out in said opinion the court has found that a custom of the trade of wool-selling which implies a warranty against false packing is a legal and valid custom; and that without any express warranty, or fraud, or knowledge on the part of the seller, he is by valid custom made liable to make good to the purchaser any deficiency in the article sold arising from false packing.

Second. For that said court should have found, as matter of law as claimed upon said trial by the defendant, that the said custom
54 mentioned in the first exception was illegal and void, because contrary to a well-settled and established rule of law, and placing upon the seller an obligation and liability which the law places upon the purchaser, and will not allow custom so to place upon the seller.

Third. That said court should have found said custom to be unreasonable, illegal, and void, as contrary to law, as claimed by the defendant upon said trial, and should therefor have rendered judgement for the defendant instead of for the plaintiffs.

Fourth. That said court should have found said custom to be illegal, as contrary to the policy of the law, as claimed by the defendant.

Fifth. That upon the facts found it appears that the said sale was a sale upon the special condition that the plaintiffs should examine the wool for himself, and that he did, in fact, examine the same so far as he desired, and the court should therefore have rendered judgement
55 for the defendant, as claimed by him.

Sixth. That said court should have, upon the facts found, rendered judgement for the defendant instead of for the plaintiffs.

Settled and allowed.

WM. D. SHIPMAN, *Judge.*

Circuit court of the United States, district of Connecticut.

E. N. KELLOGG & AL.
vs.
GEORGE M. BARNARD. } Petition for writ of error.

To the honorable the judges of the circuit court of the United States for the second circuit and district of Connecticut:

The petition of the said George M. Barnard, defendant in the above-

entitled action, respectfully represents that he is aggrived by the final judgment rendered against him in the said action upon the docket of this court, and is informed that there is error therein to his prejudice, and he is desirous that a writ of error be allowed him therefrom
56 to the Supreme Court of the United States.

Wherefore he prays that a writ be allowed him, returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas.

(Signed) GEORGE M. BARNARD,
By T. C. & C. E. PERKINS,
Of Counsel.

Order allowing writ of error.

E. N. KELLOGG, AUSTIN DUNHAM, A. C. DUNHAM, Drayton Hillyer, and J. B. Bunce,
vs.
GEORGE M. BARNARD.

On motion of T. C. & C. E. Perkins, esq., of counsel for the above-named defendant, and on filing the petition of said defendant representing that he is acgrieved by the judgment rendered against them herein, and praying a writ of error therefrom to the Supreme Court of the United States, it is ordered that a writ of error be allowed to the
57 next term of the Supreme Court of the United States; and that the same operate as a supersedeas upon the defendant giving bond, conditioned according to law, in the penal sum of eight thousand dollars, with Albert Day, of Hartford, as security thereon; and on further motion defendant prays the court to make a statement of facts involved in this issue to be embodied in the record to be made under the writ of error prayed for.

Circuit court of the United States, district of Connecticut.

E. N. KELLOGG & Co.
vs.
GEORGE M. BARNARD.

Know all men by these presents that we, George M. Barnard, of Boston, in the State of Massachusetts, as principal, and Albert Day, of Hartford, in the State of Connecticut, as surety, are holden and firmly bound unto E. N. Kellogg, Austin Dunham, A. C. Dunham, Drayton Hillyer, and J. B. Bunce, all of Hartford, in s'd State of Connect-
58 icut, in the full and just sum of eight thousand dollars, to be paid to the said E. N. Kellogg, Austin Dunham, A. C. Dunham, Drayton Hillyer, and J. B. Bunce, their executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Whereas lately, at a circuit court of the United States, second judicial circuit, holding sessions in and for the district of Connecticut, in a suit depending in said circuit court, wherein Austin Dunham, E. N. Kellogg, A. C. Dunham, Drayton Hillyer, and J. B. Bunce are plaintiffs, and said George M. Barnard is defendant, judgment was rendered against the said George M. Barnard, defendant, and the said George M. Barnard, having obtained a writ of error, and filed a copy

thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation addressed to the said E. N. Kellogg, Austin Dunham, A. C. Dunham, Drayton Hillyer, & J. B. Bunce, citing and admonishing them to be and appear at a Su-
59 preme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said George M. Barnard shall prosecute his said writ to effect, and answer such judgment and all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Signed & sealed this 22nd April, 1869.

GEORGE M. BARNARD. [L. S.]
ALBERT DAY. [L. S.]

In witness: WM. E. JENKINS.

United States of America, circuit court of the United States, second circuit, district of Connecticut.

I, Loren P. Waldo, clerk of the circuit court of the United States for the district of Connecticut, in the second circuit, do hereby certify that the foregoing pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of E. N. Kellogg, Austin Dunham, A. C. Dunham, Drayton Hillyer, and J. B. Bunce vs. George M. Barnard, No. of the
60 docket, so far as the same now remains of record or on file in said court.

Witness my hand and the seal of said court, at the city of Hartford, this 1st day of March, A. D. 1869.

[SEAL.] LOREN P. WALDO, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

61 [SEAL.] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the second circuit, and holding sessions for the district of Connecticut, within said circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or one of you, between Ebenezer N. Kellogg, Austin Dunham, and Austin C. Dunham, all of Hartford, in said district, partners in business
62 therein, by the name of E. N. Kellogg & Co., and Drayton Hillyer, and Jonathan B. Bunce, both of said Hartford, partners in business therein, by the name of Hillyer and Bunce, plaintiffs, and George M. Barnard, of Boston, in the State of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said George M. Barnard, as by this complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Wash-
63 ington, on the first Monday of December next, A. D. 1869, in the said Supreme Court, to be then and there held, that, the record

and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 1st day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

LOREN P. WALDO,
Clerk of the Circuit Court of the United States for the District of Connect'ut.

64 [SEAL.] UNITED STATES OF AMERICA,
District of Connecticut:

The President of the United States to Ebenezer N. Kellogg, Austin Dunham, Austin C. Dunham, Drayton Hillyer, and Jonathan B. Bunce, all of Hartford, in said district of Connecticut, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, A. D. 1869, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and district of Connecticut, wherein George M. Barnard, of Boston, in the State of Massachusetts, is plaintiff in error, and you
65 are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 1st day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

LOREN P. WALDO,
Clerk of the Circuit Court of the United States for the District of Connecticut.

We acknowledge service of the within.

EBENEZER N. KELLOGG,
AUSTIN DUNHAM,
AUSTIN C. DUNHAM,
DRAYTON HILLYER,
JONATHAN B. BUNCE,
By WELCH & SHIPMAN,
Their Att'ys.

HARTFORD, *May 8th*, 1869.

66 United States of America Supreme Court.—December term, 1869.

GEORGE M. BARNARD, PLAINTIFF IN ERROR,
vs.
E. N. KELLOGG, AUSTIN DUNHAM, A. C. DUNHAM, J. B. Bunce, and Dayton Hillyer, defendants in error.

Errors filed in the clerk's office of the Supreme Court of the United States to be assigned at said Supreme Court at the term thereof holden at Washington on the first Monday of December, A. D. 1869, in a certain cause brought before said court by writ of error, wherein George

M. Barnard, of Boston, in the State of Massachusetts, is plaintiff in error, and Ebenezer N. Kellogg, Austin Dunham, A. C. Dunham, J. B. Bunce, and Drayton Hillyer, all of Hartford, in the State of
67 Connecticut, are defendants in error, in the record and proceedings of a suit that was in the circuit court of the United States in and for the district of Connecticut, holden at Hartford, in and for said district, wherein said Ebenezer N. Kellogg and others were plaintiffs, and said George M. Barnard was defendant, brought before the said Supreme Court at the term thereof to be holden at said Washington, on the first Monday of December, A. D. 1869, by a writ of error.

And now the said George M. Barnard, plaintiff in error, by C. E. Perkins, his attorney, comes into court and says that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error, viz:

First. For that it appears by the record and proceedings aforesaid that the said judge of said circuit court, before whom said trial
68 was had upon the issue so joined between the parties before him, did in his said opinion and finding find and hold as matter of law, in the third conclusion of law therein, that the said custom of the trade of wool-selling found therein, which implies a warranty against false packing, is a legal and valid custom, and that without any express warranty or fraud or any knowledge on the part of the seller, he, said seller, is by said custom made liable to make good to the purchaser of wool any deficiency in the article sold arising from false packing; whereas by the law of the land the law is not so as is found by said judge in said third conclusion of law, and said judge ought not so to have held, but should have found, as a conclusion of law, from the
69 facts found, as claimed upon said trial by the said George M. Barnard, that the said custom so found was illegal and void, because unreasonable and contrary to a well-settled and established rule of law, and placing upon the seller an obligation and liability which the law places upon the purchaser and will not allow custom so to place upon the seller; and there is also error in this, for that by the record and proceedings aforesaid it appears that the judgment of the said court was given in favor of the said E. N. Kellogg and others against the said George M. Barnard, whereas, by the law of the land, in case the said judge had not so found as matter of law that said custom was legal and valid, the judgement in said cause should and ought to have been given for the said George M. Barnard, and against the said E. N. Kellogg and others.

70 Second. And there is also manifest error in this, that by the said finding it appears that the said sale of wool by the said George M. Barnard to the said E. N. Kellogg and others was a sale upon the special condition that the said E. N. Kellogg and others should themselves examine the said wool so purchased by them before making said purchase, and be bound by the result of such examination, and that thereupon said E. N. Kellogg and others did, in fact, examine said wool and purchase the same, relying upon such examination and without reference to or reliance upon said custom so found to exist by said opinion, and said court thereupon found as matter of law that although said sale was so upon condition, yet the said George M. Barnard was bound by said custom to warrant against false packing; whereas by the law of the land the court ought not to have so found, as matter
71 of law, that said parties to said sale were so bound by said custom, because the law is not so as found by said court. And

there is also error in this, for that by the record and proceedings aforesaid it appears that the judgement of the court in said cause was given [was given] in favor of the said E. N. Kellogg and others against the said George M. Barnard, whereas by the law of the land, in case the said court had not so found as matter of law, that although said sale was upon said special condition, yet said parties were bound by said custom, the judgement in said action should and ought to have been given in favor of the said George M. Barnard and against the said E. N. Kellogg and others.

Third. There is also error in this, that by the record and proceedings in said cause it appears that the judgement aforesaid was given
72 for the said E. N. Kellogg and others, and against the said George M. Barnard, whereas by the law of the land upon said record and proceedings judge should and ought to have been given for the said George M. Barnard, and against the said E. N. Kellogg and others.

And thereupon the said George M. Barnard prays that the judgement aforesaid for the errors hereinbefore set forth, and others in the record and proceedings aforesaid, may be reversed, annulled, and held for nothing, and that he may be restored to all things he has lost on account of the same, and that the said E. N. Kellogg and others may rejoin to the said errors.

By his attorney,

CHAS. E. PERKINS.

73 (Indorsed:) 238. Assignment of errors. G. M. Barnard, pl'ff in error, vs. E. N. Kellogg & al., def'ts in error.

(Indorsed:) Supreme Court U. S. 1869, Dec. term. No. 238. Barnard, pl'ff in error, vs. Kellogg, et al. Assignment of errors.

Filed 21st February, 1870.

(Indorsement on cover:) No. 238. George M. Barnard, plaintiff in error, vs. E. N. Kellogg, A. Dunham, A. C. Dunham, Drayton Hillyer, & J. B. Bunce. Connecticut C. C. U. S.

Filed 10th June, 1869.

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Supreme Court of the United States.

GEORGE M. BARNARD, Plaintiff in Error,

vs.

EBENEZER N. KELLOGG & CO., et al.

BRIEF FOR DEFENDANTS IN ERROR.

WELCH & SHIPMAN, *of Counsel.*

Supreme Court of the United States.

GEORGE M. BARNARD, Plaintiff in Error,

vs.

E. N. KELLOGG & CO., et al., Defendants in Error.

DEFENDANTS' BRIEF.

THIS action was brought to recover damages sustained by the plaintiffs in consequence of the false packing of a quantity of foreign wool in bales, purchased from the defendant in the city of Boston.

The declaration counts:

1st. Upon a sale by sample.

2d. Upon a promise, express or implied, that the bales should not be falsely packed.

3d. Upon a promise, express or implied, that the wool inside of the bales should not differ from the samples by reason of false packing.

The Circuit Court has found that by the custom of merchants and dealers in foreign wool in bales in Boston and New York, the principal markets of the country where such

wool is sold, there is an implied warranty of the seller to the purchaser, that the same is not falsely or deceitfully packed; and upon notice, within a reasonable time, the seller is bound by the custom of such merchants aforesaid, to indemnify the purchaser, and make good to him any loss he may have sustained by false and deceitful packing; that the seventy-three bales of wool in question were in fact falsely and deceitfully packed, by placing in the interior of said bales, rotten and damaged wool, dirt, and dung, which materials were foreign to, and did not properly belong to or with these fleeces, and that said foreign matter was concealed by an outer covering of fleeces in their fair and ordinary state, thus forming a fair, but deceitful exterior to the bales.

That the wool was sold in good faith by the defendant, without knowledge or reason to believe that the bales were falsely or deceitfully packed.

That plaintiffs examined the wool in the usual and customary way of purchasers of such wool, which examination did not reveal any false packing; and that an examination of the interior of the bulk of the bales of wool, generally put up like these, is not customary, and though possible, is impracticable.

As a conclusion of law, the Circuit Court sustained the validity of the custom, which had been proved to exist by the concurrent testimony of many of the witnesses on both sides.

The principal question before this Court is, whether the Circuit Court erred in sustaining the custom, on the ground that it is contrary to the rule of *caveat emptor*, and so entirely at variance with that rule as to be illegal.

It is worthy of note, that the testimony in regard to this custom was received without objection on the part of the defendant. No exception was taken to the evidence. The custom was established by "the concurrent testimony of many of the witnesses on both sides." "The point of difference among them," was not the existence of the custom, but

"touching the time within which the buyer must give the seller notice of the fraud." That the custom existed, does not seem to have been questioned.

I.

The plaintiff in error pleaded the custom in his notice, and is therefore estopped from denying its validity.

The first intimation of this custom to be found in the record is contained in the defendants' notice,—a form of pleading sanctioned in Connecticut by statute, and taking the place of a special plea at common law. The defendant sets up this custom, and as matter of defence, alleges that the plaintiff did not comply with its conditions.

The notice avers that "the defendant did not warrant the said wool to be of any especial quality, or uniform, or equal to any sample;" and further, that the said wool "was purchased by the plaintiffs of the defendant, in Boston, in the State of Massachusetts, and that by the usage and custom of dealers of wool in general, and especially in the State of Massachsetts, and city of Boston aforesaid, whenever it is claimed by the buyer of foreign wool, that the same is not according to sample, is * * * unfairly packed, &c., &c., that the buyer should within thirty days from the time of sale, give notice thereof to the seller, &c., so that the seller can become satisfied, and have the necessary evidence of the identity of the bags alleged to be falsely packed," &c., and then averring that the defendant will prove that these conditions were not complied with.

Here the defendant has, in substance, admitted the existence and validity of the very custom whose validity he now disputes.

An admission by pleading is an admission for all purposes of the cause.

Bingham *vs.* Stanley, 1 G. & D., 237.

A party is estopped from denying matter set up in his own pleadings.

Wills *vs.* Kane, 2 Grant's Cases, (Penn.) 60.
Armstrong *vs.* Fahnestock, 19 Md., 58.
Huntington *vs.* American Bank, 6 Pick., 340.

II.

While it is true to a limited extent, that courts will not recognize customs directly contrary to a well-settled rule of law, yet courts are continually, and of necessity, upholding customs not in conformity with the common law.

"It is no objection to a custom that it is not conformable with the common law of the land, for it is of the very essence of a custom that it should vary from it." By Lord Kenyon, in Horton *vs.* Beckman, 6 T. R., 764.

In the well-known case of the Paragon, Ware's Rep., p. 333, Judge Ware, in speaking of customs infringing upon the general law, says, "Such a custom," (i.e., precise, definite, and certain,) "where it is established, and so generally known and recognized, that parties are presumed in their engagements tacitly to refer to it, applies itself to the contract, and forms, as it were, the complement to the terms in which the obligation is expressed by the parties, and within its proper sphere, is equally binding with the general law."

True it is that the law which was here attempted to be invaded, was itself based upon custom, but it was none the less a part of the common law. It was as universally known to be the law of the land, as if it had originated with courts or legislatures.

Upon this point, in a very similar case in the Southern District of New York, (Chubb *vs.* 7,600 Bushels of Oats, 16 Law Rep., N. S., 492,) the Court says: "Though the bill of lading is silent on the subject of the place of storage of the article named in it, whether in the hold or on deck, the eye

of the law reads in every such stipulation, that they are to be stored in the former. The obligation rests on the usage or custom of the mercantile world, to which the shipper and carrier are presumed to be contracting parties, and which the law attaches to the instrument itself, where it is silent on the subject."

"Custom is a law established by long usage. A universal custom becomes common law. If the usage is confined to a particular place, it is a custom. Customs are sometimes allowed to prevail contrary to the rules of common law, but in such cases are construed strictly."

Wilcox *vs.* Wood, 9 Wend., 349.

All customs which are not the foundation of the common law are exceptions to it. The law merchant is based on custom. From time to time, the exigencies of commerce, the necessities of trade, create new customs. They, in turn, become the *lex mercatoria*. They are the laws which experience has taught contracting parties to make for themselves. When these customs are established by common consent, and strengthened by long observance, courts admit the fact of their existence and binding character.

Whenever a custom, not in conformity with the common law, has attained sufficient age and universality to demand recognition from the courts, it has received recognition and saction.

The mere fact that it varies from the common law is not an argument against its validity, for almost all customs in modern times have been variant from the common law. Were there no variance, there would have been no custom.

We submit that there can be no precise and definite rule established as to the admission of customs. Each custom must stand or fall by itself. If the custom and the common law can both exist, and the custom does not entirely abrogate the law, and is proved by strong testimony, then the custom stands, and the common law yields.

A custom is the modification by the mercantile community of the common law. When the modification has received the universal and continued sanction of the mercantile community, courts add their sanction, and the custom becomes recognized law.

And thus custom influences and sometimes changes the common law to an important extent. Within its proper sphere, not destroying the common law, but modifying it in accordance with the suggestions of practical experience, courts justly regard custom as entitled to high consideration.

In the language of Baldwin J., in Wilcocks *vs.* Phillips, 1 Wall., Jr. C. Ct., 63.

"The influence of usage is universal. It attaches to nations and individuals. It creates obligations. It interprets laws. General custom is a general law, and forms the law of contracts, and this sometimes, though it be at variance with their terms. It controls even the principles of law. Thus the right to the way going crops, days of grace, and time of protest are regulated by the usage of the place or bank, and affect even those who have no notice of the custom. The ancient, established, uniform and known custom of persons engaged in any trade makes a law for that trade, though it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade, are understood to consent. Its makes, supplies, and regulates their contracts. Known and settled usage ought to be respected by courts and juries, unless such usages are against the law or policy of the country, otherwise our dealings with foreigners in foreign lands will fall into disorder and confusion."

For instances of customs modifying or altering the common law which have been sanctioned by courts, we refer to—

Gibson *vs.* Culver & Brown, 17 Wend., 305.

Clark *vs.* Baker, 11 Met., 186.

Thompson *vs.* Nesmith, 12 Pick. 425.

Cookendorfer *vs.* Preston, 4 How, 317.

Halsey vs. Brown. 3 Day. 346.

Kilgore vs. Bulkley. 14 Conn. 362

III.

The custom of warranty against false packing of wool in bales, is not contrary to the rule of *caveat emptor*, but is based upon, and is a part of a well known and established exception to the rule.

It may be true that when courts have declared a principle to be law, usage cannot deny that identical principle. But to every general rule, there are limitations and exceptions. Usages attach themselves to one of these heretofore established exceptions, sometimes enlarge or create an exception.

To the rule of *caveat emptor* there are sundry exceptions. To sales coming within these exceptions, implied warranties are attached.

The second exception given by [redacted] Story, (Story on contracts, Sec. 834,) is as follows: "Where an examination of goods is from their nature or situation at the time of the sale, impracticable, a warranty will be implied, that they are merchantable. Thus, if goods be at sea, or not arrived, or if they fill the hold of a ship, so that nothing but the surface can be seen, or if they be in bales, so that an examination of the center cannot be made without tearing each bale to pieces, the seller will be understood to warrant them to be merchantable, and of the quality demanded and expected by the buyer."

"When there is no opportunity to inspect the commodity, the maxim *caveat emptor* does not apply."

Gardner *vs.* Gray, 4 Camp., 144.

Hyatt *vs.* Boyle, 5 Gill & J., 110.

The interior of wool in bales is in fact as much concealed from the buyer as if the bale was in the hold of a vessel on the ocean. The court below finds that the inspection of the interior of the bale is "impracticable"—which is practically equivalent to "impossible."

Foreign wool or cotton comes into market packed in bales of about 1000 pounds each, secured by iron hoops, and having been subjected to very great pressure. From the nature

of the commodity, the difficulty and expense of opening the bales, the lack of machinery with which to repack them, the delay and labor incident to an attempt to examine the interior of the bulk, a personal inspection of the contents of each bale and of each fleece is impossible. Fraudulent packing is thus rendered easy and difficult of detection. Pecuniary redress for the fraud is impracticable unless there is a general rule of warranty extending from the consumer to the original packer or grower. For it would be well nigh impossible for each successive person through whose hands the goods passed from the parties in South America, to the manufacturer in the United States, to take a special warranty against false packing. A general and universal rule prevents fraud, and renders the rights and liabilities of all parties certain and easy of enforcement.

Learned courts have therefore been constrained to decide that on a sale of such goods as baled cotton, or wool in bales, there was an implied warranty, that substances foreign to the article sold were not concealed in the interior of the package.

The ground upon which this implied warranty has been based is, that in a sale of such goods as packed cotton there could be no examination of the bulk, and that from the nature of the article, and the form in which it comes to market, there can be no inspection of the contents of the bale.

"Every sale of packed cotton must be considered *in the nature* of a sale by sample—which amounts to a warranty that the whole bulk shall compare with the specimen exhibited."

Oneida Mfg. Co. *vs.* Lawrence, 4 Cowen, 444.

"In a purchase of packed cotton, although the purchaser examines the article by personally taking samples from a great number of bales, and then from the samples selects a quantity of bales which he purchases, the sale thus made is a sale by sample, and in judgment of law amounts to a warranty."

Beebe *vs.* Robert, 12 Wend., 413.

The court say, "in the Oneida Mfg. Soc. *vs.* Lawrence, 4 Cowen, 444, the Chief Justice remarked that every sale of packed cotton must be considered in the nature of a sale by sample. It seems to have been contended in that case that it was not a sale by sample, because the plaintiff's agent saw the bags, in which the cotton was packed before he made the purchase; and that it therefore fell within the general rule, that when the vendee has an opportunity of examining the commodity, the vendor is not responsible for any latent defect without fraud or express warranty. But from the very nature of this article, and the form in which it is sent to market, no effectual examination can be made without breaking up the bales. This is never done; the trouble and expense of re-packing effectually prevents it. Although the plaintiff's agent in this case saw the bags, and drew samples from them he had no opportunity of examining the bulk of the commodity; he was compelled still to rely upon the samples. It was therefore a sale by sample."

In Boorman *vs.* Johnston, 12 Wend., 566, a sale of packed cotton, the court say, "I fully subscribe to the general doctrine, that in sales of personal property, the vendor is not liable for any defect in the article sold, without fraud or warranty. When the purchaser has an opportunity of examining the article which he purchases, the rule *caveat emptor* applies. A sale by sample is *per se* a warranty that the bulk shall correspond with the sample. This results from the principle, that the rule *caveat emptor* applies where the purchaser has an opportunity to examine the articles which he purchases. Cotton is sold by the bale. How can the purchaser examine the article? Only externally and superficially, and the interior only to a small extent. The instruments with which the samples are taken in general are from eight to twelve inches in length, and samples are in fact taken from about four inches. Such is the proof in this case, and it is further proved that the damage in the middle of the bales

could not have been discovered without opening the bales. Here is a good reason why *caveat emptor* should not apply. You cannot examine the article without opening the bales. That is never done—it would not be permitted, and would be attended with great expense and inconvenience. Hence, as I have heretofore said in the case of the Oneida Mfg Co. *vs.* Lawrence, 4 Cowen, 444. Every sale of packed cotton is a sale by sample. It is so by the usage of trade, which is founded upon general convenience and consent; that usage is shown in this case.

Gallagher *vs.* Waring, 9 Wend., 20, was a case of the sale of cotton in bales situated in the store of the vendor, in the place where both parties resided.

It did not appear but that the usual examinations could have been had. The cotton was falsely packed. After deciding that under the circumstances of the case it was a sale by sample, Judge Nelson in giving the opinion says—"Even admitting that the sale was not by sample, the plaintiff was entitled to recover under the second count if he could show that the cotton was not of a good merchantable quality or condition; as in a purchase without an opportunity for inspection by the vendee, the law imples a warranty by the vendor to this extent, whether the vendor has had an opportunity of inspection or not. Under such circumstances it would be as absurd to permit a vendor to fulfill his contract by delivering an article of the kind contracted for of no value, as it would to permit him to fulfil it by delivering an article of a totally different kind, as oakum instead of cotton."

IV.

The validity of this custom, and other customs modifying the rule of *caveat emptor* in a similar manner has been recognized and sanctioned by judicial decisions.

In general "it seems that the custom of any particular trade may establish an implied warranty, between parties transacting business therein, it being presumed that the dealings of the parties were regulated by the custom in the absence of evidence to the contrary."

Chitty on Contracts, page 454.

Jones *v.* Bowden, 4 Taunt., 853.

The validity of this particular custom, applied to packed cotton was recognized by the Supreme Court of Mass., in Casco Mfg. Co. *v.* Dixon, 3 Cush., 407.

The strong analogy between that case and the one at bar, the high reputation of the court, and the fact that it gives the law of the place where the contract was made, justify us in giving the opinion at length.

It was an action on the case, brought by the buyer of cotton in bales, against the seller, for a false and fraudulent packing thereof, without the knowledge of the latter.

The declaration contained three counts—two upon a sale by sample, alleging that the cotton was deceitfully packed and bound, and a large portion of it was not like to, or as good as the samples, but poor and fraudulently packed. The third count alleged the sale to have been made with a warranty, but that the cotton was of inferior quality.

The defendants pleaded the general issue, and filed a specification of defence, in which, it was alleged, that if the cotton was falsely packed, the plaintiffs were bound by law and usage to give immediate notice thereof to the defendants, with the other incidents of the custom alleged in the defendants' notice in this case.

Ch. J. Shaw in giving the opinion of the court says "The sale is alleged to be a sale by sample. On the facts stated, it is questionable whether the sale was a sale by sample, in the sense in which that term is commonly used. But it is not necessary to decide that question. The first question to be considered is, whether the evidence of usage, offered by the

defendants, was admissible. Evidence of a general usage, in regard to a branch of trade, is ordinarily admissible. All persons dealing in any branch of business are presumed to be acquainted with any usage affecting it, and are presumed to intend to deal in reference to it. Such a usage is evidence of what is reasonable: that is, of what is suitably adapted to secure both parties in their rights."

"We are thus brought to examine the grounds of this action. The plantiffs disclaim charging the sellers with any knowledge of false packing; nor is there the slightest evidence of it. From the nature of the fraud it could only be discovered on opening the bags for use. The action, therefore, could only be sustained on the ground of an implied warranty, arising out of the nature of the transaction, and of the commodity; the place and manner of its growth, production, and packing for market; and its transportation from the place of growth to the place of manufacture. Such warranty is an implication of what the law will reasonably infer, as to the intent and understanding of parties buying and selling under the circumstances.

It is not easy, perhaps not practicable, to examine the bags through at the time of sale. It may be reasonably implied that the seller intends to sell and the buyer to purchase, cotton like that which appears on the surface, or that which the sample drawn in the usual way exhibits; and, if, instead of such cotton, there should be found stones, or cotton seed, or very inferior cotton, the seller will make an allowance, either by substituting other cotton, by rescinding the contract, and taking back the article, or by paying the difference in money.

But as this an implication arising out of the nature of the transaction, for the reasonable security of the buyer, it may by the same reasonable implication, be limited and qualified by such conditions as are reasonably necessary to the safety and security of the seller.

Cotton is raised in a warmer climate than ours, and in distant states, and packed and baled in the interior of the country, commonly by planters, by whom considerable quantities are raised. It is thence transported by land to a seaport,

and thence by ship to other ports, and sold by merchants who have bought in quantities to sell again; or perhaps, more commonly it is sold by consignees.

From this view of the circumstances several conclusions are obvious:—

1. That the seller cannot know of the supposed defects until the bags have passed out of his hands, and gone to the manufacturers to be opened and used.

2. That if the bales are falsely packed, it is reasonable that the party buying should have a remedy against the seller; and it is not less reasonable that such seller, equally ignorant and innocent of the fraud, should have the like remedy, both against his vendor or consignor, and so through the whole series.

3. That such remedy can only be available to him in case he has seasonable notice of the fraud, and is furnished with such authentic evidence as shall enable him and his vendors and consignors to go back to the author of the fraud; that is to say, the planter by whom or by whose agents or servants, for whom he is responsible, the fraud was committed.

4. It is therefore a reasonable qualification and condition of the seller's responsibility, and of the buyer's right to indemnity, that the latter shall give the former such notice, and furnish him with such proofs and means of recourse; and this is required alike by public policy and the plain dictates of justice. The same reasonable considerations which create the implied obligation, limit and qualify it; and without a compliance with such reasonable considerations, the buyer is not entitled to the indemnity claimed."

Thus, prior to the time of this sale, the Supreme Court of Massachusetts had recognized and sanctioned the custom. It was the *lex loci contractûs*. It was a part of the contract, and formed "the complement of the terms in which the obligation was expressed by the parties."

For examples of the customs sanctioned by courts which vary or modify the rule of *caveat emptor*, we refer to

Sewall *vs.* Gibbs, 1 Hall, 602.

Sumner *vs.* Tyson, 20 N. H., 384.

V.

The customs, contravening the rule of *caveat emptor*, which have been disregarded by the courts are of a very different nature from the one now under consideration.

The former were customs whereby the seller impliedly warranted his wares to be "merchantable," and were thus directly at variance with the common law. This custom is not a warranty in regard to character or quality, but is in effect a warranty against fraud; that "material foreign to, and not properly belonging to or with" the article sold has not been secretly placed within the bale.

Dickinson *vs.* Gay, 7 Allen, 29.

Thompson *vs.* Ashton, 14 Johns., 316.

Wetherell *vs.* Neilson, 20 Penn., 448.

Whitmore *vs.* So. Boston Iron Co., 2 Allen, 52.

Dodd *vs.* Farlow, 11 Allen, 426, are all cases of customs of warranty with respect to the "merchantable" character of the goods sold.

Courts may very properly say, as the Massachusetts court has said, that they will not permit an implied warranty that goods are merchantable, because such a custom would nullify *caveat emptor*—while they admit, as the Massachusetts court has admitted, the validity of a custom whereby bales purporting to be wool are warranted not to be fraudulently filled with worthless and foreign substances.

The custom has relation to two of the great staples of commerce, wool and cotton—relates not at all to the character or quality of the article, but is aimed at fraud, which is concealed and impossible to be detected at the time of the sale.

In reply to the "second error," viz., that the sale was a sale upon condition that the wool should be examined—that it was examined, and therefore the seller is not bound by any implied warranty, we submit,

1st. That the examination which was required was the "usual examination of the article"—the examination as to character and quality. It did not relate, and was not intended to relate, to false packing in the interior of the bales. Such examination is "impracticable."

This further appears conclusively from the fact that subsequent to the sale, the seller acknowledged the existence of the custom, and that the sale was made under it. When notified of the false packing, he requested "that the marks and numbers of the bales found falsely packed might be sent to him, when he would examine into the matter, and do what was proper and just."

2d. When an express or implied warranty exists, an examination of the article sold is not a waiver of the contract.

Willings *vs.* Consegua, Pet., C. Ct., 301.

Especially is this true when the articles are so prepared and present such an appearance as to deceive purchasers.

Henshaw *vs.* Robbins, 9 Met., 83.

Tye *vs.* Fynmore, 3 Camp., 462.

Shipherd *vs.* Kain, 5 Barn. & Ald., 240.

Osgood *vs.* Lewis, 2 Har. & Gill., 495.

If it is claimed that the defendant had given his broker instructions that the wool should be so examined and accepted by the purchaser that the implied warranty should be in effect waived, we reply that no such instructions were communicated to the plaintiffs, and

A principal is liable for the acts of a general agent in all matters within the customary and usual scope of the business upon which the agent is employed, although the agent exceeds private instructions, not communicated to the party acting with such agent.

Story on Agency, p. 147, and note.

Howard *vs.* Sheward, 2 Law Reports, (C. P.) 148.

N. Shipman,

WELCH & SHIPMAN,

Of Counsel.

SUPREME COURT

OF THE

United States.

GEORGE M. BARNARD, PLAINTIFF IN ERROR,

vs.

E. N. KELLOGG, A. DUNHAM,
A. C. DUNHAM, DRAYTON HILLYER,
AND J. B. BUNCE.

IN ERROR TO THE CIRCUIT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF CONNECTICUT.

DECEMBER TERM, 1869, NO. 238.

BRIEF OF CHAS. E. PERKINS, OF COUNSEL FOR THE
PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

GEORGE M. BARNARD, Plaintiff in Error.

vs.

E. N. KELLOGG, et al.

Brief of Plaintiff in Error.

The material facts upon which the questions of law in this case arise, are in substance as follows:

In 1864 Mr. Barnard was a commission merchant in Boston, and had received from a shipper in Buenos Ayres a large quantity of wool on which he had made advances.

He placed part of it in the hands of brokers in Boston, instructing them not to sell unless the purchaser came to Boston and examined the wool for himself, and the broker telegraphed Kellogg & Co. that the wool must be examined Monday.

Mr. E. N. Kellogg came on to Boston on Monday, and examined four bales in the broker's office as fully as he desired, and was offered an opportunity to examine all the bales and have them opened for his inspection, which he declined.

The sale was made August 17, 1864, and May 1, 1865, Kellogg & Co. notified Mr. Barnard that the wool was falsely packed. The sale was not a sale by sample, nor was there any warranty, unless one is implied by the usage hereinafter mentioned.

By the custom of dealers in wool in New York and Boston, there is an warranty by the seller implied from the fact of sale, that the wool is not falsely packed. The wool in question was falsely packed, but this was not known to Mr. Barnard, he supposing it was fairly packed.

Upon these facts two questions arise.

I. Is the custom found to exist, a legal and valid one.

II. If it is a legal custom, is the seller bound by it when he expressly stipulates that the purchaser shall *examine the wool himself.*

I. Is this custom a legal and valid one ?

What is it ?

It is stated on page 14, in the twelfth conclusion of fact, to be, that by the custom of dealers in wool in bales, in New York and Boston, there is an implied warranty from the fact of sale, that the wool is not " falsely packed."

We claim that it is fully settled by the authorities in New York and Massachusetts as well as elsewhere, that such a custom is illegal and void, as being opposed to a plain and well established general principle of law.

1st. It is unnecesary to cite authorities to show that in sales of personal property no warranty of quality or condition is implied.

No principle of law is better established or has been more often affirmed. The decision referred to by the court on page 16, gives a fair statement of the English view of the law.

The case of Salisbury *vs.* Stainer, 19 Wend. 158, is directly in point, and has always been considered a leading case on the subject. There bales of hemp were sold, which turned out to be falsely packed. It was claimed that a warranty of quality was implied, but the court held otherwise, and say, "Where the purchaser has an opportunity to inspect the goods, no principle is better settled than that the seller in the absence of fraud is not answerable for latent defects. The rule is *caveat emptor*. The judge erred in charging the jury that there was an implied warranty that the inside should correspond with the outside of the bales."

In Ormerod *vs.* Huth, 14 Meeson & Welsby, p. 651, bales of cotton were sold, samples having been shown, but no warranty was given that the cotton was equal to the samples. The bales were falsely packed, but the seller, who was a commission merchant, did not know it. Tindal, C. J., says, "The rule which is to be derived from all the cases appears to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he cannot recover upon a mere representation of quality by the seller unless he can show that the representation was bottomed in fraud."

Innumerable other authorities might be cited to the same point, but I consider them unnecessary.

2d. It is I think now quite as well settled, that a usage in opposition to a settled rule of law is void.

One of the earliest cases decided on this point is Edie *vs.* East India Co., 2 Burr, p. 1216, decided in 1761.

On the circuit Lord Mansfield admitted evidence of a custom of merchants by which a draft negotiable under the general law was made non-negotiable. But in the opinion of the full court given by him, he says, "I am very clearly of

opinion that I ought not to have admitted any evidence of the particular usage of merchants in such a case. Of this I say I am now satisfied, for the law is already SETTLED."

In Brown *vs.* Jackson, 2 Wash. C. C., p. 24, decided in 1807, evidence was offered to show that by usage of merchants, if the holder of an endorsed bill calls on the drawer for payment he exonerated the endorser. Judge Washington says, "The cause seems to turn upon the right of the plaintiff to recover as the holder of this bill, and the law upon this subject is settled. It would therefore be improper to let a contrary usage be proved, which is only proper in doubtful cases."

In the same year the case of Frith *vs.* Barker, 2 Johnson's Rep., p. 327, was decided, in which the opinion was given by Kent, C. J. The question was whether a custom was valid that freight must be paid on goods lost by peril of the sea, and the court say, "Though usage is often resorted to for explanation of commercial instruments, it never is or ought to be received to contradict a settled rule of commercial law. This was so determined in the case of Edie *vs.* East India Co., 2 Burr, 1216."

In Woodruff *vs.* Merchants Bank, 24 Wend., p. 673, evidence was offered to prove a usage in New York City that a certain kind of bill of exchange should not be allowed days of grace, and Nelson, C. J., in giving the opinion, says: "The effect of the proof of usage as given in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York. We need scarcely add, even if the witnesses were not mistaken, and the usage prevails there as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." This decision was afterwards unanimously affirmed by the Court of Appeals, in 6 Hill, 174.

In Homer *vs.* Dorr, 14 Mass., p. 26, evidence was offered to prove a usage that part of an insurance premium on a voyage to a port and back should be returned if the vessel brought back no cargo. The court say, "The law applicable to this case is plain, well settled, and generally understood. Evidence of custom and usage is useful, in many cases, to explain the intent of parties to a contract. But the usage of no class of citizens can be sustained in opposition to principles of law."

In United States *vs.* Buchanan, 8 Howard 83, a usage that a purser should charge commissions contrary to the rule of law, was held invalid.

In Thompson *vs.* Riggs, 5 Wallace, 663, evidence was offered to prove a usage of banks in Washington to pay coin deposits in coin when so specified in the checks, and the court say, "Usage contrary to law, or inconsistent with the contract, is never admitted to control the general rules of law or the real intent and meaning of the parties."

Reference is also had to the following cases, which settle this principle beyond a question:

Thompson *vs.* Ashton, 14 John, 316.
Rankin *vs.* Am. Ins. Co., 1 Hall, 619.
Hinton *vs.* Locke, 5 Hill, 437.
Beirne *vs.* Dord, 1 Selden, 95.
Bowen *vs.* Newell, 4 Selden, 194.
Wheeler *vs.* Newbould, 16 N. Y., 395.
Hone *vs.* Ins. Co., 1 Sanf., 137.
R. R. Co. *vs.* Morgan, 52 Barb., 217.
Coxe *vs.* Heisley, 19 Penn. St., 243.
Wetherell *vs.* Neilson, 20 Penn. St., 448.
Boon *vs.* Steamship Belfast, 40 Ala., 184.
Dickinson *vs.* Gay, 7 Allen, 29.
Dodd *vs.* Farlow, 11 Allen, 426.
Sturges *vs.* Buckley, 32 Conn., p. 21.
Eaves *vs.* Savings Bank, 27 Conn., p. 229.
Leach *vs.* Beardsley, 22 Conn., p. 404.

III. It is also expressly held that a custom by which a warranty is implied against false packing, or any other defect, contrary to the rule of *caveat emptor*, is void.

In Thompson *vs.* Ashton, 14 John, 316, crates of crockery were sold, some of which contained ware of an inferior quality, and evidence was offered to prove a custom that in such sales the seller impliedly warranted the quality to be uniform. The Court excluded the evidence, and say, "No custom in the sale of any particular description of goods can be admitted to control the general rules of law. Such a principle would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels."

In Beirne *vs.* Dord, 1 Selden, 95, evidence of a custom that in the sale of blankets in bales, the seller impliedly warranted them all equal to a sample shown, but without any express warranty, was held not admissible, and in the opinion of the Court they quote the above extract and approve of it.

In Wetherell *vs.* Neilson, 20 Penn. St., (8 Harris) p. 448, evidence was offered to show that in Philadelphia, by custom, in the sales of soda ash, a warranty of uniform quality was implied from a representation which was not an express warranty. The Court excluded the evidence, and say, "The law is that mere representation does not imply a warranty. If we admit evidence of this special custom, we allow the law to be changed by the testimony of witnesses, or by the soda dealers of Philadelphia."

But the latest, most fully considered, and most decisive of all the decisions on this subject, are in Massachusetts, where this sale was made, and by whose laws the validity of the custom should be tested.

In 1863, the question came directly before the Court in the case of Dickinson *vs.* Gay, 7 Allen, p. 29. On a sale of cases of satinets, made by samples, there was in both the samples and the goods a latent defect, which could not be discovered by inspection, nor until the goods were printed, so that they were unmerchantable. It was claimed that by custom there was in such case a warranty implied from the sale, that the goods were merchantable. But the Court, after a very full review of all the authorities, decided that the custom being contrary to the rule of law, and holding "that a warranty is implied when by law it is not implied," is void; and close by saying, "The purchasers in such a case might have required that the bill of sale should express a warranty against latent defects, if such warranty was to be made. They should not have relied on a usage of such a character as has been held bad by a long series of judicial decisions."

Dodd *vs.* Farlow, 11 Allen, p. 426, decided in 1865, is, if possible, more conclusive. There, forty bales of goat skins were sold by a broker, who put into the bought and sold note, without authority, the words, "to be of merchantable quality, and in good order." It was claimed that by custom, in all sales of such skins, there was an implied warranty that they were of merchantable quality, and therefore the broker was authorized to insert those words—but the Court held that the custom was unauthorized by law, and invalid. They say, "It contravenes the principle which has been sanctioned and adopted by this Court, upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the same subject;" and they affirm the cases of Thompson *vs.* Ashton, 14 Johnson, 316, and Dickinson *vs.* Gay, 7 Allen, 34.

If decisions can settle any principle of law, this one would seem to be fixed.

But there is no decision directly opposed to them except the case of Snowdon *vs.* Warder, 3 Rawle, 101, which has been overruled in Coxe *vs.* Heisly, 19 Penn., (7 Harris,) 243, and Wetherell *vs.* Neilson, 20 Penn., (8 Harris,) 448.

There are some cases in New York, in Cowen and Wendell, which it has been claimed adopt a contrary view; but all of these were sales by sample. No evidence of custom was introduced in them, and so far as they endeavored to introduce an exception to the rule of *caveat emptor* they have been overruled by Beirne *vs.* Dord, 1 Selden, p. 95.

The case of Casco Manufacturing Co. *vs.* Dixon, 3 Cush., 407, which is the only one relied upon by the court below, is not fairly susceptible of such a construction. It was a sale by sample, and the only question was whether, the seller being liable because he had warranted the cotton equal to the sample, the custom as to what the purchaser was bound to do before recovery was legal.

This view of the case is sustained by the view taken of this case in Dickinson *vs.* Gay, 7 Allen, 29, where the court say it was a usage as to what a buyer of cotton in bales must do to establish a claim for damages for fraudulent packing.

If it were anything more than this, it is utterly inconsistent with the cases of Dickinson *vs.* Gay and Dodd *vs.* Farlow, and those cases could not have been decided without referring to this case and overruling it; nor can we suppose that so important a principle opposed to so many authorities could be intended to be established by the court without citing some of the foregoing cases, and giving some reasons for deciding contrary to them.

We claim therefore that this usage is clearly void as contrary to a well settled principle of law.

4th. We claim that such a custom is void as unreasonable.

The general principle that customs must be reasonable, is also too well settled to require citations.

This custom is unjust and unreasonable because grossly inequitable towards the seller, placing a burden upon him which he cannot avoid, and giving him no corresponding benefit, while the purchaser can in the easiest possible manner protect himself by requiring an express warranty.

The position of the two parties is entirely different. One receives a ship-load of wool of many thousand bales. To be safe he must examine all these bales or be responsible, whereas the purchaser need only examine the fifty or sixty which he buys.

If the seller obtains the wool himself in a foreign country, there is no custom which protects him there, so while he is forced to give a warranty he has no redress over unless he can prove actual fraud.

He has still less redress if he is a commission merchant, as in the present case, for the goods are sent to him to sell *as they are*, and between the consignor and the commission merchant no warranty is implied.

It is unreasonable because it applies only to one article, and not to other similar articles.

There is just as much reason why it should apply to hemp, flour. tea, coffee, and everything else which comes in packages or in bulk.

II. But even if the court should be of the opinion that this custom is a legal and valid one, it cannot be allowed to contradict or alter the express terms of sale.

"Proof of usage is admitted either to interpret the meaning of the language of a contract, or to ascertain the nature and extent of the contract in the absence of express stipulations, and when the meaning is equivocal and obscure."

"Though usage is admissible to explain what is doubtful, it is not admissible to contradict what is plain."

1 Greenleaf on Ev., Sec. 292, pp. 233, 234.

Thompson *vs.* Riggs, 5 Wall., 663.
Oelrichs *vs.* Ford, 23 How., 49.
Schooner Reeside, 2 Sumner, 567.
Ware *vs.* Rubber Co., 3 Allen, 84.
Leach *vs.* Beardslee, 22 Conn., 404.
Eaves *vs.* Savings Bank, 27 Conn., 229.

Mr. Barnard made it an express condition of the sale that the purchaser should come to Boston and examine the wool, (p. 15.) And this condition was communicated to Kellogg & Co., who went to Boston for that express purpose.

It is impossible that either party should have understood that Mr. Barnard was to warrant the quality of the wool whether examined or not, for the examination could only be for the purpose of removing all possible liability from the seller.

This is as evident as if an express renunciation of liability had been written out at length.

Whether Kellogg & Co. fully understood the terms of sale or not, the broker must have done so, and from the letters and telegrams on pp. 12 and 13, he was evidently acting as agent of Kellogg & Co.

By law a broker is the agent of both parties.
Story on Agency, p. 28, Sec. 28 and note 2.

So far as he was the agent of Mr. Barnard, he could not go beyond his instructions.

If Kellogg & Co. did not fully understand the terms of sale or the powers of the broker, they should have inquired. There was certainly sufficient to put them on enquiry as to the meaning of the terms used, and the authority of the broker.

We say, therefore, that the custom was illegal and void, and the judgment should be reversed.

CHAS. E. PERKINS,

Counsel for the Plaintiff in Error.